No. 5707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

FRANK L. HAYES,
Appellee.

BRIEF FOR APPELLEE.

MARTIN I. WELSH,
A. H. MORGAN,
Farmers and Mechanics Bank Building, Sacramento,
Attorneys for Appellee.

PERNAU-WALAH PRINTING CO., SAN FRANCISCO.

Subject Index

Table of Authorities Cited

No. 5707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

FRANK L. HAYES,
Appellee.

BRIEF FOR APPELLEE.

THE COMPLAINT STATES A CAUSE OF ACTION AND THE COURT DID NOT ERR IN OVERRULING THE DEMURRER.

Appellant attacks the sufficiency of the complaint generally, solely on the ground that the allegations of the complaint show on the face thereof that the representations were not of material fact, but that they were in the nature of "sales talk" or matters of opinion. It is argued in effect, that since the complaint alleges that defendant falsely represented to plaintiff that the land in question was capable of producing *all sorts* of farm crops and products, and that the land *was entirely free* from *all* conditions and things injurious and harmful to the growth of fruit trees, and that the land was perfectly adapted to the

raising of deciduous fruits of *all kinds* in commercial quantities,—that the plaintiff was bound to know, and that it must be held as a matter of law that he did know, that the representations made were false and were not intended as representations of fact and that he had no right to rely upon them, and that therefore appellee has failed to state a cause of action.

(a) The record shows that the demurrer was overruled by consent. (Tr. p. 16.) Nor was there any exception taken to the above ruling of the demurrer,—nor, indeed, could an exception very well be taken to a ruling which appellant stipulated might be made. Exception must be taken to the overruling of a demurrer or else error in such ruling, if any there was, is deemed to be waived. *(G. A. I. Co. v. Hall,* 219 U. S. 307.)

(b) In counsel's argument on the merits of the demurrer they depart from the record and state the following facts which they seem to assume to be matters within the common knowledge of all and of which they apparently assume the court will take judicial knowledge of: that no land on earth will produce all sorts of farm products; that no land is entirely free from all conditions and things injurious or harmful to the growth of fruit trees; that every orchardist must combat conditions of the soil injurious to the growth of his trees; that no land is perfectly adapted to the raising of deciduous fruits of all kinds in commercial quantities; that no land is capable of producing large crops of any kind of deciduous fruits.

Next in their argument on this point, they depart entirely from the complaint, and make the statement

that no land produces crops *at all times* of the finest quality. Suffice it to say that there is no such allegation in the complaint.

Again they depart from a consideration of the complaint itself, and point out that the plaintiff came to California on a tour of inspection, which, we submit, has nothing to do with the sufficiency of the complaint, whatever bearing that may have on the proof of his cause of action, for that fact does not appear in the pleadings.

(c) As hereinabove pointed out, the appellant stipulated that the demurrer might be overruled and the case thereafter went to trial and evidence was introduced and the case tried on the theory that representations were made to the appellee that the land in question was adapted to the growing of deciduous fruits in commercial quantities; that it was rich and fertile; that it had proven to be adapted to the growing of fruit in commercial quantities; that it was as well adapted therefor as other land in the vicinity which had proven to be well adapted to the growing of such fruit; that the land was worth the amount of the contract price; and that the appellee was a resident of Nebraska at the time of the transactions and was compelled to and did rely upon all of the said representations. And evidence on all of the above mentioned phases of the case was introduced *without objection.* That being the case, we submit that plaintiff may not now raise the point that the complaint is defective.

Nashua Savings Bank v. Anglo American, 48 L. Ed. 782.

(d) So far as the allegations of the complaint as to the representations made to the appellee are concerned (and it is only as to the materiality of the representations alleged to have been made that the complaint is attacked in the argument of counsel), the allegations that the appellee was a resident of the State of Nebraska and was compelled to and did rely upon all of the representations made, followed by the allegations concerning the misrepresentations as to the value of the land,—alone, states a cause of action. In addition to the above allegations, the complaint avers that the defendant in error was not at all familiar with California lands; and then follow the allegations concerning the misrepresentations as to the quality and adaptability of the land. That such representations made under the circumstances alleged, are as to matters of fact and not of opinion only is supported by a vast number of cases. On the subject we cite the following:

Powell v. Oak Ridge Orchard Co., 84 Cal. App. 714;
Dickey v. Dunn, 80 Cal. App. 724;
Harris v. Miller, 196 Cal. 8;
Smith v. Low, 18 Fed. (2nd) 817;
French v. Freeman, 191 Cal. 579;
Stone v. McCarthy, 64 Cal. App. 158;
Teague v. Hall, 171 Cal. 668;
Herdan v. Hansen, 182 Cal. 538;
Cross v. Bouch, 175 Cal. 253;
Seimer v. Dickinson, 299 Fed. 651;
Scott v. Delta Land & Water Co., 57 Cal. App. 320.

We do not propose to take up the time of the court with a lengthy discussion of all of the above cited cases. We shall, however, take up a few of the above mentioned cases in which the facts alleged and proved were very similar to those in the instant case.

In the case of *Scott v. Delta Land & Water Co.*, 57 Cal. App. 320, the complaint alleged and the court found that the defendant falsely represented to the plaintiff, among other representations, that the land in question was of the *best* quality; that it was fertile in *every* respect; that it was *free* from alkali and noxious weeds; that it was suitable for the growing thereon of *all kinds* of crops of hay, grain and vegetables. There were other misrepresentations alleged and found by the court, that the upper court conceded might not be considered representations of material fact. But as to the above mentioned and certain other alleged representations, the upper court held that the judgment might be sustained on evidence supporting *any one* of said alleged misrepresentations.

The court in sustaining the judgment of the lower court held that the representations made were of material fact and not of opinion; that although the plaintiff was himself a farmer, yet since a chemical test was necessary to determine the quality of the soil, the mere fact that he was on the land before the transaction was entered into, had no bearing on his right to recover, for obviously he could not detect its quality by merely seeing it.

In the case of *Powell v. Oak Ridge Orchard Co.* (supra), one of the grounds of appeal was that the evidence did not support the findings. Following the

averments of the complaint, the court found that the plaintiff had been induced to enter into the contract through the following false representations made by the defendant with intent to induce plaintiff to enter into the contract; that the property was of the reasonable value of $4500.00; that the land was free from hardpan under or near the surface of the soil; that there was no hardpan in the district in which the land was situated; that the land was particularly productive and was the best orchard and farm land, and that the soil was particularly adapted to the raising of fruit. It was further found in conformity to the allegations of the complaint that all of the above representations were false; that the same were made with intent to induce plaintiff to enter into the contract; that the true facts were that the land was underlaid with hardpan from eight to fourteen inches below the surface; that the land was situated in a district where hardpan generally existed; that very little of the land was suitable for the raising of fruit; that it was not worth more than $1500.00 at the time of the contract; that the plaintiffs had had no previous experience as farmers or orchardists or in dealing in farm lands, and knew nothing of the value or character of land, and that in entering into the transaction they relied wholly upon the representations made by the defendant.

The evidence showed that the plaintiff Powell had for many years prior to the time of entering into the contract been a railway man and knew nothing of fruit raising or of the productivity or fertility of soil. With the intention of retiring from railway service

and going into the business of fruit raising, *he visited the property* in question. Defendant's agent went over the property with the plaintiff, and during that tour of inspection made the representations set forth in the findings.

About a year and a half later the contract was entered into, the trees began to die, whereupon the plaintiff, accompanied by soil experts, tested the land and found the same to be underlaid with hardpan, as set forth in the findings. Experts testified that the land was of little or no value for fruit raising. There was also evidence that the land was of no greater value than the court found it to be.

It was held that the evidence amply supported the findings of fact by the court, and in effect the court held that there was sufficient evidence to support the finding that the representations as to the value of the land, of its productivity and fertility and of it being free from hardpan,—were and each of said representations was representations of material fact upon which the plaintiff had the right to rely, even though he was on the land himself and made a tour of inspection of same before he entered into the contract.

In so holding, the court (page 718) quoted with approval the language of the court in the case of *Dickey v. Dunn*, 80 Cal. App. 724:

> "* * * The evidence shows that the plaintiff, who was by trade a watchmaker, had no knowledge of the soil conditions and *was without sufficient experience to determine the truth of the representations.* Where a purchaser is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him

> *(Teague v. Hall,* 171 Cal. 668), and while it appears that the plaintiff visited the property before the transfer was made, the evidence sufficiently supports the findings that he relied upon the representations, *both as to its value and character.* The statements as to the character of the soil and as to the water supply were clearly misrepresentations of fact. (French v. Freeman, 191 Cal. 579; Stone v. McCarthy, 64 Cal. App. 158.). *A statement as to value is not always made as a mere expression of opinion. It may be a positive affirmation of fact intended as such by the party making it, and reasonably regarded as such by the party to whom it was made;* and when it is such it is like any other representation of fact, and may be fraudulent representation warranting rescission. * * *" (Italics ours.)

(e) The numerous cases cited by appellant in support of its argument on this point do not support its contention. We will briefly review the California cases cited.

1. *Rendell v. Scott,* 70 Cal. 514. The decision is very short and all of the allegations of the complaint are not set out. The court held that the demurrer to the cross-complaint was properly sustained, giving as a reason that there was no averment excluding personal inspection on the part of the vendee, and that in absence of such averment, allegations to the effect that the defendant represented that the land in question was the best in Ione Valley; that the same was very rich and productive; that a part of the land was rich in mineral deposit; a part thereof good alfalfa land and another portion would produce fifty bushels of wheat to the acre,—must be considered statements of opinion only.

In the instant case, the complaint does exclude personal inspection on the part of the plaintiff, in that it is alleged that at the time of the contract, plaintiff was a resident of Nebraska and was compelled to and did rely solely upon the representations of the defendant.

Furthermore, as hereinabove pointed out, there are innumerable later cases holding that representations as to the quality and productivity of land, where the same are made positively as statements of fact, will be considered representations of material fact and not matters of opinion only.

Scott v. Delta Land & Water Co., supra;
Powell v. Oak Ridge Orchard Co., supra;
Dickey v. Dunn, supra;
Herdan v. Hanson, supra;
French v. Freeman, supra.

2. In the case of *Hacklemand v. Lyman*, 50 Cal. App. 323, the plaintiff had been a resident of the district where the land was situated for many years. Certain misrepresentations were alleged to have been made by the defendant to the effect that the land in question had had water over it in the past; that about 25 acres thereof was irrigable and could be put into crop immediately after suitable ditches had been constructed. By the plaintiff's own testimony after the alleged representations were made, he went upon the land with an expert, who advised him that in his opinion water never had been on the land, and that while it was his opinion that the land was too high to be irrigated, yet that fact could not be determined without a survey of the land. The court held that since

the plaintiff went upon the land with an expert for the purpose of investigating and inquiring into the facts concerning which the representations were made, it would be presumed that he did not rely upon the representations of the defendant.

The court states the rule, (page 326):

> "If a purchaser of real estate visits the property prior to the sale and makes a personal examination of it *touching representations* as to its quality, character, or condition, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase provided the vendor does nothing to prevent his investigation being as full as he chooses." (Italics ours.)

3. The case of *Holton v. Noble,* 83 Cal. 7, merely held that representations by the plaintiff that the land in question would produce a certain amount of produce per acre were expressions of opinion and were not sufficient to ground a defense of fraud. The circumstances under which the statements were made are not set forth in the opinion. Our comment on the case of *Rendell v. Scott* (supra) applies with equal force to this case.

4. In the case of *Gleason v. McPherson,* 175 Cal. 594, the only representations actually made by defendants themselves were that the bonds which were the subject matter of the contract, were gilt edge, that they were safe, a good investment, and that the principal would be duly paid. These statements were, as the court expressed it, "avowedly based on the aforesaid statement for December, 1907, and the two letters of McPherson and Englebrecht, both of which were shown

to Gleason as the foundation thereof." The judgment of nonsuit was affirmed. In this case, there was no evidence even tending to show that defendants did not have reasonable grounds for believing their statements to be true.

5. In the case of *Woolson v. Coburn,* cited by plaintiff in error, defendant set a defense of fraud to an action for specific performance of a contract to convey land.

The alleged false representations were that the plaintiff had represented that a certain tract of land involved consisted of 120 acres, whereas there was only 110 acres in the tract; and the further representation that springs of water on said land would begin to flow when the rains came and would continue to flow for about eight months each year.

As to the representation concerning the size of the tract, the court held that there was sufficient evidence to support the finding that plaintiff knew at the time of entering into the contract that the tract was in fact only 110 acres in size.

As to the second alleged misrepresentation, the lower court found that the plaintiff had stated to defendant that for a number of years said springs had started to flow from the time the rains came and had continued for about eight months each year, and that it was his opinion that the same would continue. The upper court held that the evidence amply supported the finding that plaintiff's statement concerning past year in regard to the springs was true. As to the prediction of defendant concerning the future flow of the springs, the court said (page 323):

> "* * * That part of the representation which refers to the future—that wherein respondent's son told appellant that 'in the winter months when there is rain there will be plenty of water for the stock'—was but an unfulfilled prediction or erroneous conjecture as to a future event. * * *"

EXCEPTIONS TO THE CHARGE TO THE JURY WERE NOT PROPERLY TAKEN.

The remainder of appellant's brief is devoted to assignment of errors respecting the charge of the court to the jury.

The exception taken to the charge of the court to the jury was as follows:

> "Mr. Butler.—We except to the charge, and particularly to the instruction upon the subject of representations, manner of communication to the plaintiff. Also to the instruction regarding the false representations, and knowledge of falsity on the part of the defendant, and intent to deceive. Also the instruction upon the subject of the belief of the plaintiff of the truth of the representations, and the inducement and the reliance. Also upon the subject of damage. Also to that portion of the charge relative to the absence of certain witnesses, Harris, Wamser, and Holmes, and Fletcher." (Tr. p. 156.)

We submit that exceptions taken in the manner above set forth is not sufficient.

Had the instructions been numbered and the exceptions taken merely by number, the same would have been as adequate, or even more adequate, to apprise the trial court of the particular instruction complained of.

Categorically, the exception might be set out as follows:

Defendant excepts particularly to the following instructions:

The instruction on the subject of representation;

The instruction on the manner of communication to plaintiff;

The instruction regarding false representations;

The instruction regarding knowledge of falsity on the part of defendant;

The instruction regarding intent to deceive;

The instruction upon the subject of belief of the plaintiff of the truth of the representations;

The instruction on the subject of inducement and reliance;

The instruction on the subject of damage;

The instruction relative to the absence of the witnesses Harris, Wamser, and Holmes, and Fletcher.

So far as pointing out anything definite to the court, and thereby giving the court an opportunity to correct the charge if there was any merit to the exception, appellant may as well have stopped with the first clause of the exception, namely, "We except to the charge," and gone no further.

In the following cases, the above manner of saving exceptions is condemned.

Killisnoo Pack. Co. v. Scott, 14 Fed. (2d) 86;
Alaska Steam Co. v. Katzeek, 16 Fed. (2d) 210;
Jones v. United States, 265 Fed. 235.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

It is urged that the court erred in instructing the jury that the representations made by appellant to the effect that the land in question was rich and fertile and highly productive and well adapted to successful commercial orcharding were representations of fact. It is argued that since plaintiff intended to go out and make his own investigation, the statements were therefore only statements of opinion.

There is no evidence in the record tending to show that the appellee ever made any attempt to investigate the property so far as the representations concerning the adaptability of the land to fruit growing, or its quality or fertility, prior to the time of his entering into the contract.

Counsel urges that if it be held that the representations in question be not held to be expressions of opinion as a matter of law, still whether they were statements of material fact or expressions of opinion were matters for the jury to determine.

(a) As hereinabove mentioned, exception was not properly taken to the instruction.

(b) Appellant has not ventured to incorporate in the transcript the representations made in the literature in question. That being the case, it would be impossible for this court to pass upon the question of whether the representations made in the literature were or were not representations of material fact. It must be presumed, therefore, that representations in the pamphlets which the court refers to in the instruc-

tion in question, were such representations as would warrant the giving of the instruction complained of.

Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697 at 702;

Bryant v. Gray, 179 Cal. 679.

(c) There is no merit to the defendant's contention that the representations made were matters of opinion only. That matter has been discussed under the first assignment of error.

(d) In the charge complained of, the court touched on the matter of the materiality of the representations as follows: Speaking of the representations as to the adaptability of the land, the court said,

> "They are in the yellow book, Gentlemen of the Jury, there is no question about that at all; that is no reasonable interpretation of this book other than that it represents that the lands in Rio Linda are well adapted to successful orcharding commercially * * * The representation was there, and he has a right to count upon it * * * But as I said to you, it is in the book, and that is enough for the plaintiff's case, if he read it before he entered into the bargains, and he says he did, and it is for you to say whether or not he did."

The above is the only part of the charge from which it could possibly be understood by the jury that the representations were to be taken by the jury as statements of material fact and not opinion. And what statements does the court refer to? The statements and representations made in the literature; and what those statements were is not before the court here.

As we have hereinabove pointed out, there can be no doubt, under the rules laid down by numerous de-

cisions in this state, that where positive statements are made concerning the quality of the soil in question and its adaptability for a certain purpose, under circumstances here shown to have existed, that such statements are as to material fact, upon which the party to whom they were made has the right to rely, and not mere matters of opinion.

The court, throughout the whole charge to the jury, left it to the jury whether or not the representations alleged were actually made. Now, had the court giving the charge complained of, referred to the oral testimony instead of the printed matter, still the charge would not have been erroneous. In the case of *Scott v. Delta Land etc.,* 57 Cal. App. 320, the allegations as to the representations made were, among others, that the land was of the best quality, fertile in every respect, suitable for the growing thereon of hay, grain and vegetables, and free from noxious weeds and alkali. The trial court found that the representations were made *as alleged.*

In affirming the judgment for the plaintiff, the upper court said,

> "The judgment may be sustained upon evidence supporting any one material misrepresentation * * * *The representations as to the productive quality of the soil* and as to the adequacy of the water supply were material factors which, if they furnished an inducement to the vendees to enter into the contract made by them, would afford ground upon which to base a rescission when their falsity was established. * * * *Misinformation as to the material matters referred to* would constitute representations as to existing facts and conditions, and would not fall within the category of mere opinion or speculation." (Page 324. Italics ours.)

The upper court in reviewing the evidence on the subject of the representation concerning the quality and adaptability of the soil, found the evidence to show that the agent of the company took the plaintiff on the land, took a shovel and showed him the soil at different places and told plaintiff that it was all fine soil and that he had never seen better soil. The agent showed him stands of alfalfa near the land in question and trees and berries on other land near the tract and told him that just such products could be raised on the land in question.

The court went on to say (page 326):

> "* * * As to the representations concerning the character of the soil, it must be conceded that such representations, testified by Scott as having been made, warranted the latter in believing and assuming that the soil was of a character as would produce crops of general kinds suitable to that locality and in acreage quantities."

So we have court holding, as a matter of law, that representations as to the quality and productivity of the soil, made in a manner and under circumstances and conditions very similar to the instant case, were not expressions of opinion only, but representations of material fact, which would ground an action of fraud.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE QUESTION OF THE FALSITY OF THE PRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

Concerning the exception taken to this instruction, the appellant failed to sufficiently set forth or designate the portion of the charge concerning which the

exception pertained. This assignment of error appears in the transcript as Assignment of Error No. IV (Tr. p. 31), and the instruction is not set out under that assignment of error. The argument in appellant's brief proceeds under the question of knowledge of falsity of the representations.

A reasonable interpretation of the instruction here complained of does not show that the court took from the jury the question of knowledge of the falsity of the representations on the part of appellant. At the outset the jury is told that if they find that the representations were false, then the next question for them to determine is whether defendant knew the same were false, or whether in reason, defendant ought to have known it, or whether the assertion was made positively, which in the eyes of the law is equivalent to knowledge. Following this, the court touches and comments on the evidence tending to show that the defendant either did or should have known of the truth or falsity of the statements. It is hardly worth while to cite authorities on the right of the trial court to review and make comment on the evidence of the case in giving the instructions. Then the court tells the jury, "* * * Furthermore, it makes this assertion positively, taking the book for it and taking the plaintiff's statements, if you do, as to what the agents told him"* * * As above pointed out, since the representations made in the books or pamphlets are not before the court here, it must be assumed that the representations therein made were positive statements of fact which would ground an action of fraud. Following the above mentioned portion of the charge, the

court said: "* * * When a company or a man asserts positively that a thing is adapted to this or that, is proven to be adapted to this or that, he is bound to have knowledge, and the law will not hear him to deny it. It is to be inferred that if it was false he knew it was false. In legal contemplation, it is the equivalent." From this portion of the charge, appellant picks out the last sentence and sets it out in its argument in a manner indicating that what the court meant by the last sentence was, that if the representations made by the defendant before the court were false, the defendant knew it was false. We submit that the whole of the last portion of the instruction which we have hereinabove quoted must be read together, and that all the court did in that portion of the charge was to instruct the jury generally as to what the law is where a party has made a positive assertion of fact.

We submit that the effect of the rules laid down by sections 1710 and 1572 of the Civil Code of California is as stated by the court in the instruction in question.

If the jury could have gotten the idea from the portion of the instruction which appellant complains of, that the court intended to instruct them that if they found the representations to be false, they need not consider the question of knowledge on the part of the defendant, all doubts must have been dispelled by the instruction which immediately follows, and which appellant cunningly omitted in its argument. The instruction immediately following is as follows (Tr. p. 148): "*If you believe from the greater weight of the evidence* that the defendant knew it was false,

or should have known it, or made a positive assertion, that infers knowledge, and then you proceed to the next step, and that is, did the defendant make this statement with the intent that the plaintiff should believe it * * *."

The remainder of the appellant's argument on the instruction is based on such a strained and absolutely baseless construction of the charge of the court, that we do not deem the same worthy of answer.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE QUESTION OF PLAINTIFF'S RELIANCE ON THE ALLEGED REPRESENTATIONS.

Again in this assignment of error, we wish to remind the court that an exception to this instruction was not taken in the proper manner as hereinabove pointed out.

A portion of the instruction contained on pages 33 and 36 of the transcript under appellant's assignment of error No. VI, is set out in the argument and attacked.

The contention is made that the instruction complained of is argumentative. We submit that an examination of the instruction will disclose that so far as being argumentative is concerned, the instruction merely gives a perfectly fair review of the evidence pertaining to the matter involved in the instruction, which, as above pointed out, is perfectly proper and permissible.

There is no conflict in the evidence to the effect that the respondent knew nothing of California lands nor

the land in question or of the value or its quality, productivity, or adaptability for this or that purpose. The evidence shows without conflict that he came to California for the primary purpose of a vacation and stopped in Sacramento as an incident to his trip, and while here went out to the district in question in company with one of the agents of the appellant on several occasions before going back to Omaha. It shows without conflict that he made no attempt whatever to investigate the quality of the land nor its adaptability to fruit raising, nor its value.

The evidence further shows that he did not know what hardpan is and had no reason to believe or suspect that there existed close to the surface of the soil a thick layer of hardpan, nor did he have any reason to believe that the existence of such hardpan rendered the land unfit for fruit raising. It is not disputed that the only trips respondent made to the district in question and upon the land in question prior to the time of entering into the contract, were made in company with an agent of the appellant. This agent, the evidence shows, took respondent to districts adjacent to the tract in question and showed him what appeared to be thrifty orchards and vineyards, and told him that the land in question was the same as the land of these other districts. According to respondent's testimony, he inquired of the agent why there were not more orchards and vineyards on the tract in question, and the agent told him in effect, that the district was new and that it would take time for the settlers to get their orchards in; that the purpose of the owners was to raise poultry until they could finance

the planting and rearing of orchards. The respondent's testimony further shows that at the time the agent showed respondent the tract which was the subject matter of the first purchase, respondent was told that the tract in question was the best tract appellant had left, and that it was particularly good because it had "drainage." Respondent testified that he believed and relied upon all of the representations made to him. The evidence shows the only circumstance that came to the mind of respondent that created the slightest doubt in his mind, was the fact that there were few orchards growing on the tract, and as above pointed out, the agent gave him a reasonable explanation of that fact. (Tr. pp. 39 to 47 inclusive.)

Now, in the portion of the instruction set out in the argument and concerning which appellant complains, the court did no more than to refer to and comment on the evidence bearing upon respondent's reliance upon the representations in question.

Furthermore, the court left the question of whether respondent did in fact rely upon the representations, to the jury.

It is not contended that the court assumed anything not in evidence nor that the court misstated the facts nor that the court took the question of reliance from the jury, but it is contended in effect that where a party *starts* an investigation after the representations have been made to him, he is thereafter foreclosed from claiming that he relied upon the representations made to him and that therefore the instruction was against law. We know of no case, in this state at least, which

goes that far. The case of *Hacklemand v. Lyman*, 50 Cal. App. 323, cited by appellant under its first assignment of error, which is the only California case cited by appellant bearing directly upon the question, does not go to any such length. The court there states the rule in the following language (page 326):

> "If a purchaser of real estate visits the property prior to the sale and makes a *personal examination of it touching representations* as to its quality, character, or condition, he will be presumed to rely, not upon the representations but upon his own judgment in making the purchase, provided the vendor does nothing to prevent his investigation being full as he chooses." (Italics ours.)

In that case, the plaintiff took an expert out on the land and investigated the very conditions concerning which the representations were made. Whereas, in the instant case, while appellee did visit the land in company with appellant's agent, there is no evidence showing that appellee made any kind of an investigation on his own account *concerning the representations made to him.*

The instant case comes within the rules laid down in the cases which we have hereinabove referred to under other portions of our brief. (*Scott v. Delta Land etc. Co; Powell v. Oak Ridge Co,* supra.) As we have pointed out, those cases present circumstances almost identical with the circumstances here. Under those authorities, it was at least a question for the jury to determine whether appellee did or did not rely upon the representations made to him, and he is not foreclosed from claiming that he did so rely upon

the representations merely because he was on the land prior to the time of the purchase.

Appellant in its argument, makes the following misstatement of facts,—a statement which is entirely unsupported by the evidence: "He" (the appellee) "comes to the community where the land is situated and begins an investigation into the truth or falsity of these statements as to value," * * *; and further the appellant makes the statement that he (the appellee) made the inspection of the land "by himself,"—meaning, we presume, that he made an independent investigation. Following these misstatements of fact, counsel launches into a very unintelligible line of argument, the gist of which seems to be, that it was the legal duty of appellee to have investigated the question of the value of the land; that this he failed to do; that the court said nothing about appellee's investigation of values which was inexcusable on the part of the court; and finally that the court by its charge to the jury, "makes the ignorance of the buyer an excuse for his not having found out the truth about these matters."

We have hereinabove answered the contention that an investigation was made by the appellee as to the truth or falsity of the representation.

As to the contention that it was the duty of appellee to make an investigation, the authorities above cited and analysed answer that. In the case of *Teague v. Hall,* 171 Cal. 668, the court reversed a judgment of the lower court on an instruction held erroneous which in effect told the jury that it is the duty of a

party to investigate the facts where the means of knowledge is open to him, unless he is prevented from so doing by some act on the part of the other party. The court stated that while some of the earlier decisions supported the rule set forth in the instruction there in question, yet the modern tendency is the other way. The court there adopted the rule as stated in *Pomeroy, Equity Jurisprudence,* Sec. 898:

> "Whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent relying on and being misled by it, must be clearly and conclusively established by the evidence. *The mere existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact."

In the case of *French v. Freeman,* 191 Cal. 579 at 587, the court said:

> "In other words, the fact that the vendee visited the land is important in determining whether he relied and was entitled to rely upon the statements of the vendor."

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE QUESTION OF DAMAGES.

The next assignment of error was not properly excepted to for the reason that the court's attention was not called to the portion of the charge complained of.

The complaint alleged that the parties entered into the contracts whereby appellee conveyed to appellant the two parcels of real estate in Omaha at the agreed valuations of $6800.00 and $5800.00 respectively, subject to certain mortgages in the sum of $4136.39 and $3000.00 respectively, and that appellant accepted said conveyances as part payments in the sum of $2663.61 and $2800.00 on account of said contracts. The answer admits that the contract was entered into as alleged and admits that under the terms of the agreement the amounts hereinabove mentioned were allowed as part payment on said purchase price. (Tr. pp. 4, 9, 18, 19.) The contracts were introduced into evidence. (Tr. p. 49.)

Mr. Gibson, appellant's representative from Omaha who acted on behalf of appellant in effecting the exchange, testified on behalf of appellant, but not a word of testimony was elicited from him concerning the value of the properties in Omaha. Appellant did not attempt in any way to show that the property which the appellee conveyed to appellant was actually worth less than the amount allowed for it by the agreement of the parties,—though the agent of appellant, who was a real estate dealer in Omaha, where the property is situated, and therefore competent to testify as

an expert as to the value of the property, was in court and testified on behalf of appellant.

The contract itself, by the terms of which it was agreed by the parties that the Omaha properties should be accepted by appellant as a part payment on the contracts in the amounts above mentioned, is evidence that the amount allowed was the reasonable value thereof.

It is well settled that the agreed value of a thing is at least prima facie evidence of its actual value.

In the case of *Bringham v. Knox,* 127 Cal. 40 at 44, it was held that where the complaint alleged the agreed value, that it was sufficient allegation of the actual value, and that where the defendant had failed to deny the allegation of agreed value, the fact was thereby established without the necessity of proof on the part of the plaintiff, by being admitted by the pleadings.

The case of *Wood v. Niemeyer,* 185 Cal. 526, was an action based on fraud in inducing plaintiff to enter into an exchange of properties. The court held that the memorandum containing a list of the personal property and the agreed value of each item was evidence of the actual value thereof, as bearing on the question of the amount of actual damage plaintiff had suffered.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY IN RELATION TO THE ABSENCE OF HARRIS, WANZER, HOLMES AND FLETCHER, AS WITNESSES.

Here again appellant urges its everlasting criticism of the trial court for reviewing, commenting upon and referring to the evidence in giving the charge to the jury.

As we have pointed out before, it is perfectly permissible for the trial court in giving a charge to the jury to review the evidence, comment upon the same and point out points of weakness or strength with a view to aiding the jury in arriving at a just decision.

In the case of *Vicksburg Ry. Co. v. Putnam,* 118 U. S. 545, the trial court went by far to greater lengths in reviewing the evidence, and expressing opinion on the evidence than did the court in the instant case. In that case the Supreme Court in affirming the judgment had the following to say on the subject:

> "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury."

The trial court, in the instruction here complained of did no more than to comment upon the fact that the owners of the land concerning which Morley testified would be in a better position to testify as to the productivity of the land than was Morley. The Judge

then instructed them that there is a rule of law that where weaker evidence is produced when stronger is available, that fact may be considered in determining the weight to be given the weaker evidence. The court then expressly admonished the jury that it was for them to say what weight was to be given Morley's testimony.

Appellant complains that it was not shown that the owners could be produced. The answer to that is that the process of the court was open to appellant to bring their testimony before the court.

We submit that there is nothing objectionable about the instruction, and that there is no merit to appellant's contention that it was erroneous.

We respectfully submit that the trial was conducted in a fair and impartial manner, and that no reversible error was committed, and that the judgment should therefore be affirmed.

Dated, Sacramento,
June 1, 1929.

Respectfully submitted,

MARTIN I. WELSH,
A. H. MORGAN,
Attorneys for Appellee.